

## The Search for Legitimacy: Interventions Under the Responsibility to Protect

by

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INTERVENTIONS UNDER THE RESPONSIBILITY TO PROTECT**

by

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## **ABSTRACT**

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Following the 1994 genocide in Rwanda, the United Nations Secretary-General called upon the international community to prevent similar atrocities in the future. To this end, Gareth Evans and Mahmoud Sahnoun led an international effort to examine the responsibility of both a sovereign state and the international community to protect people from mass atrocities regardless of their geographic location. In so doing, Evans and Sahnoun reframed the basic notion of sovereignty, to wit: if a state fails in its responsibility to protect those people within its borders from mass atrocities, the state may not use sovereignty as a shield to prevent the international community from taking appropriate action. The doctrine of Responsibility to Protect outlines, inter alia, the means by which the international community may legitimize coercive intervention otherwise deemed a violation of sovereignty. In its current, immature stage, the doctrine articulates some initial means by which the United Nations may legitimize coercive action; however, the United States should lead the international community to develop secondary means of legitimacy to fulfill the obligation to protect endangered people when the United Nations Security Council fails to authorize coercive intervention.





## THE SEARCH FOR LEGITIMACY: INTERVENTIONS UNDER THE RESPONSIBILITY TO PROTECT

The collective shame of the international community following the 1994 genocide in Rwanda<sup>1</sup> spurred the United Nations (UN) to endorse the Responsibility to Protect doctrine at the 2005 United Nations World Summit.<sup>2</sup> More than a decade passed between the horrors of the machete wielding mobs hell-bent on genocide within Rwanda's borders until the UN vote to formally adopt the principles within the Responsibility to Protect and its corresponding framework for implementation. The unanimity with which the World Summit endorsed the Responsibility to Protect seemed an encouraging, tentative step toward establishing a sense of global accountability to prevent the next Rwanda. While the international community's acceptance of the Responsibility to Protect marks significant progress toward protection of civilians, much work remains. The doctrine consists of a continuum designed to prevent atrocities, react when they occur, and rebuild once they are resolved. This paper examines the second prong of the Responsibility to Protect, namely, the duty of the international community to take positive action upon the onset of atrocities and the legitimate means under which the international community may intervene.

All nations have an interest in preventing atrocities and restoring peace if prevention fails; however, the United States bears a unique burden of leadership in the current uni-polar world. Because of the United States' military and economic supremacy, it continues to dominate global discussions on many international issues. The current administration has embraced a multilateral approach to resolving conflict

around the world striving to share the burden of conflict prevention and military intervention with other nations. The 2010 National Security Strategy (NSS) refers to the prevention of genocide and mass atrocities as one of the “key challenges requiring broad global cooperation.”<sup>3</sup> Although all nations within the international community share the burden to prevent genocide and mass atrocities, the United States should lead the discussion in the area of the Responsibility to Protect and shape the dialogue<sup>4</sup> concerning how to legitimize coercive military intervention to save the lives of targeted civilians. Given its role as the dominant power in world affairs, the United States may effectively encourage the international community to develop secondary means of legitimizing military intervention in those instances when the United Nations Security Council (Security Council) fails to authorize coercive action under the Responsibility to Protect doctrine.

### Background

All members of the UN adopted the doctrine of the Responsibility to Protect in 2005; however, the Security Council did not authorize military intervention under the doctrine for six years. When Qaddafi indiscriminately targeted Libyans in specific cities in 2011,<sup>5</sup> the international community’s political will coalesced. The Security Council approved a resolution that authorized intervention while also formally and expressly applying the principles of the Responsibility to Protect by including the phrase, “[r]eiterating the responsibility of Libyan authorities to protect the Libyan population.”<sup>6</sup> Approximately one year later, the Security Council failed to pass a similar resolution vis-à-vis the situation in Syria when China and Russia both vetoed the measure.<sup>7</sup> Soon thereafter, the United Nations General Assembly addressed the issue separately and voted overwhelmingly to remind Syria of its Responsibility to Protect ordinary

inhabitants, including those residing within the sovereign territory of Syria.<sup>8</sup>

Unfortunately, given the tensions between Russia, China, and the other three Security Council Members, it appears likely that future situations will occur in which the Security Council will not reach consensus to invoke the Responsibility to Protect.<sup>9</sup> The recent veto vis-à-vis Syria demonstrated the need for the international community to identify alternate means to authorize military intervention. To that end, the United States should consider identifying additional means to legitimize procedures under which the international community could take coercive action within a sovereign state's borders. If the United States does not assume the lead in this area, it risks yielding the ability to shape the dialogue in a manner consistent with its national interests. Shifting momentum in the international community is always a difficult task; however, given the sensitivity of this particular subject, the difficulty will grow and risk leaving the United States on the sideline of one of the most critical issues facing civilians around the world.

Last year, the international community dealt with Libya;<sup>10</sup> this year, it deals with Syria.<sup>11</sup> In the future, similar situations will develop in other areas of the world whether in Nigeria, the Philippines, or elsewhere. In the 2010 annual threat assessment to Congress, the Director of National Intelligence noted the threat of future genocides, stating, "[l]ooking ahead over the next 5 years, a number of countries in Africa and Asia are at significant risk for a new outbreak of mass killing."<sup>12</sup> The time to establish alternate strategies of legitimacy is now rather than later. Establishing acceptable alternate means to legitimize coercive action under the Responsibility to Protect will reduce the amount of time necessary to react to some future event, thereby increasing the chances that more lives will be saved. The United States then will be better

positioned to shape the means for legitimacy in accordance with terms of its liking, thereby reducing the risk of ad hoc mechanisms which could be used arbitrarily by foes to create global crises later against allies like Israel.

If the United States accepts the challenge of identifying alternate means to legitimate coercive intervention, several options exist. One option focuses on the United Nations General Assembly. A second option looks to a recognized regional organization operating in close coordination with the UN and within the geographic region of the conflict. A third option seeks legitimacy through recognized regional organizations outside the geographic location of the conflict.<sup>13</sup> Because some states have concerns about the misapplication of the Responsibility to Protect doctrine, the United States may deem it prudent to reassure the international community that they do not intend to expand the limited intervention criteria for the Responsibility to Protect. After doing so, the United States should consider leading and supporting efforts to identify specific means to legitimize coercive action when a state, through omission or commission, fails to protect people within its own borders from mass atrocities.

#### Responsibility to Protect Doctrine

The Responsibility to Protect doctrine arose from the 2001 “Report of the International Commission on Intervention and State Sovereignty (ICISS).”<sup>14</sup> The report yielded groundbreaking concepts that redefined the Westphalian concept of sovereignty. At its core, the report sought to address “the question of when, if ever, it is appropriate for states to take coercive --- and in particular military --- action against another state for the purpose of protecting people at risk in that other state.”<sup>15</sup> The commission laid bare the traditional notion of territorial sovereignty and found that at its root, “[s]tate sovereignty implies responsibility, and the primary responsibility for the

protection of its people lies with the state itself.”<sup>16</sup> In those instances where a sovereign is the aggressor, a malevolent bystander, or simply incapable of halting specified atrocities towards an identified group of people within its borders, the international community may incur an obligation to act to protect targeted people. In other words, the Wesphalian “principle of nonintervention yields to the international community’s responsibility to protect populations at risk.”<sup>17</sup> Having established the cornerstone for this fundamental shift in the concept of sovereignty, the ICISS carefully developed an acceptable framework for legitimate international intervention. The ICISS ultimately decided that legitimacy for military intervention would require approval by the UN. While the ICISS’ revolutionary work provided an excellent foundation for establishing the Responsibility to Protect, it did not establish clear means by which legitimization could occur if the Security Council itself failed to act.

The ICISS sought the “broadest possible range of views”<sup>18</sup> from a globally diverse group of regional commissioners to develop the Responsibility to Protect doctrine.<sup>19</sup> The ICISS built a solid foundation for acceptance, among all Members of the United Nations, for the narrow principles contained in the Responsibility to Protect. To achieve universal agreement, the ICISS precisely defined instances in which the Responsibility to Protect could be invoked. Furthermore, the ICISS sought to clearly articulate that the Responsibility to Protect consisted of a continuum of actions for which the international community bore responsibility. The first action focused on the obligation to prevent the atrocities. The second action outlined the instances in which reaction and coercive intervention would be appropriate. The final action iterated the obligation to rebuild

those institutions that had been depleted or destroyed as a result of coercive intervention.<sup>20</sup>

The core of the Responsibility to Protect doctrine holds first, that the traditional notion of sovereignty cannot serve as a shield by which a government permits or actually conducts specified atrocities against people within that state.<sup>21</sup> Second, the doctrine holds that the international community bears a responsibility to take action to protect civilians from mass murder, ethnic cleansing, or genocide irrespective of the geographic location of those civilians.<sup>22</sup> In its report, the ICISS noted the understandable concern any state might have in conceding that another entity like the UN could legitimately approve the use of armed intervention within another state's sovereign territory. Mindful that "[m]ilitary intervention for human protection purposes is an exceptional and extraordinary measure,"<sup>23</sup> the ICISS established a baseline or "Just Cause Threshold" before the international community could legitimately consider military force. The "Just Cause Threshold" requires that

[t]here must be serious and irreparable harm occurring to human beings, or imminently likely to occur...[whether] large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale 'ethnic cleansing' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>24</sup>

The ICISS limited the sets of circumstances to the aforementioned in order to address the concerns of less powerful states who feared that more broadly defined circumstances could provide a legal carte blanche for a more powerful state to overrun a less powerful government.<sup>25</sup> Indeed, the ICISS "resisted any temptation to identify as a ground for military intervention human rights violations falling short of outright killing or ethnic cleansing"<sup>26</sup> and did so intentionally in order to build the broadest basis of

support. Ultimately, the international community concurred with these narrow categories for which coercive intervention might serve as a viable option. During the course of the ICISS's discussions and panels, various members of the international community lobbied for broader bases to authorize intervention such as "HIV/AIDS, climate change or the response to natural disasters." However, unanimity of agreement on the Responsibility to Protect could only be achieved when the criteria were limited to the situations of mass murder, genocide, and ethnic cleansing.<sup>27</sup> As noted earlier, the 2005 United Nations World Summit spoke with one voice when it unanimously endorsed the principles of the "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>28</sup> Specifically, the General Assembly adopted the following:

138. Each individual State has the responsibility to protect its populations from *genocide, war crimes, ethnic cleansing and crimes against humanity*. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from *genocide, war crimes, ethnic cleansing and crimes against humanity*. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from *genocide, war crimes, ethnic cleansing and crimes against humanity*. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from *genocide, war crimes, ethnic cleansing and crimes against humanity* and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build

capacity to protect their populations from *genocide, war crimes, ethnic cleansing and crimes against humanity* and to assisting those which are under stress before crises and conflicts break out (emphasis added).<sup>29</sup>

Both the ICISS and the UN recognized the inherent tension that exists in this concept of the dual responsibility of sovereignty. The ICISS identified the need to strike a balance between the Responsibility to Protect and international law's respect for territorial borders,<sup>30</sup> both customarily and in the UN Charter.<sup>31</sup> Correspondingly, the ICISS identified four precautionary principles required before the international community may legitimately authorize military intervention.

Given that a state or alliance's decision to use force to inflict its will upon another sovereign will cause some degree of harm to those in the targeted state as well as the intervenors, the international community should view military intervention as an option of practicable last resort. The ICISS identified four concepts to examine before applying force to protect a population. Those four principles include (1) the right intention of the intervenors, (2) no less effective means exist to prevent or halt atrocities, (3) proportionate military intervention, and (4) the coercive intervention has a reasonable prospect of success.<sup>32</sup> The intervenors must have as their "primary purpose...to halt or avert human suffering"<sup>33</sup> but the doctrine does not require that it be the only reason for taking action. Arguably, some intervenors may have secondary motives to act but so long as their primary goal is to alleviate human suffering, they may act even in the absence of a 'pure heart.' As a counter-balance, the ICISS specifically noted that the Responsibility to Protect should not be used as an excuse for a powerful state to overrun a less powerful state.<sup>34</sup> The ICISS explained that human rights violations short of genocide, ethnic cleansing, or large-scale loss of life<sup>35</sup> do not fall within the rubric of Responsibility to Protect.<sup>36</sup> Finally, the ICISS elucidated that the, "[o]verthrow of regimes



is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection – and what is necessary to achieve that disabling will vary from case to case.”<sup>37</sup> Hence, in the case of Syria, if Assad were to (1) halt the targeting of civilians within Syria's territorial borders and meaningfully disavow future harm to the Syrian populace, (2) reposition military and police force within Syria, and (3) invite UN observers to Syria, then the conditions precedent to invoke coercive intervention under the Responsibility to Protect would no longer exist and regime change in Syria would then fall beyond the scope of any intervention.

Regarding the second principle, the doctrine requires that, as a practical matter, nothing short of military intervention will prevent or halt the suffering.<sup>38</sup> This standard does not require the international community to try every other option in some formulaic manner before intervening militarily – it recognizes unique circumstances will exist in each case and the fluidity of the situation will determine the appropriate course of action.<sup>39</sup> Akin to a consequentialist approach, intervenors should act only if their intervention will prevent more harm than it will cause. They must be reasonably sure that the “[atrocities will be] severe enough so that the consequences [of military action] are likely to be better – or at least not worse – than those that would have occurred without intervention.”<sup>40</sup> Next, the third principle requires that coercive intervention have a reasonable chance of success. If, for example, the Chinese government engaged in ethnic cleansing against the Uighurs to forcibly remove them from their native territory within China and the first three criteria were met, action under the Responsibility to Protect still would not be justified. In this example, the international community could

not meet the fourth criteria because outside military intervention most likely would fail to keep the Uighurs safe given the remoteness of the territory, China's military might, and the depth of China's strategic forces. If the "Just Cause Threshold" has been satisfied and the precautionary principles have been met, the international community must then find the "right authority" to legitimize the military intervention under the Responsibility to Protect.

To establish stringent standards by which the international community could intervene militarily within the sovereign borders of a state, the ICISS identified the Security Council as the only body which could legitimately authorize such intervention.<sup>41</sup> Indeed, the ICISS noted that "[t]he criteria have to be tough, because the action proposed is itself extreme: military intervention means not only an intrusion into a sovereign state, but an intrusion involving the use of deadly force, on a potentially massive scale."<sup>42</sup> The ICISS followed by asking, "whose right is it to determine in any particular case, whether a military intervention for human protection purposes should go ahead?"<sup>43</sup> After examining the issue in detail,<sup>44</sup> the ICISS ultimately determined that only the Security Council could take such action.<sup>45</sup> The ICISS deserves great credit for establishing the Responsibility to Protect and securing unanimity of the United Nations Members to accept the dual-notion of sovereignty and the criteria for military intervention; however, the time has come to reassess the means by which coercive intervention may be authorized. Given the continuing polarization among the Permanent Five Members of the Security Council, the international community should explore alternate means through which it may legitimize the use of force to halt genocide, mass murder, or ethnic cleansing.

At the time it issued the report in 2001, the ICISS itself acknowledged the potential, practical difficulties with vesting the Security Council with the sole ability to legitimize the use of force; however, upon examining other options, the ICISS determined no more palatable means existed. The ICISS recognized that the Permanent Members of the Security Council could, unfortunately, act with self-interest and veto a Responsibility to Protect resolution, effectively neutering the international community's ability to intervene militarily under proper authority. In an attempt to prevent such a miscarriage of justice, the ICISS recommended:

[t]hat the Permanent Five members of the Security Council should consider and seek to reach agreement not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.<sup>46</sup>

More than a decade has passed since the ICISS made this initial recommendation and more than a half dozen years have passed since the United Nations unanimously approved the fundamental basis of the Responsibility to Protect. In that time, the international community, acting through the United Nations Security Council has authorized coercive military intervention under the Responsibility to Protect just once, in Libya in 2011.<sup>47</sup> The Permanent Five members of the Security Council never agreed to abrogate their veto power on Responsibility to Protect matters as the ICISS recommended in 2001. Without an express agreement from the Permanent Five to abstain rather than cast a veto, the legitimizing portion of the Responsibility to Protect has suffered significant damage. When the ICISS identified the Security Council as the legitimizing function of the Responsibility to Protect, it did so with the caveat that the Permanent Five operate under the agreement to abstain rather than veto when faced with a Responsibility to Protect resolution. Indeed, many scholars in the Responsibility

to Protect area voiced concern that self-interest and political division within the Permanent Five members of the Security Council would prevent effective application of military intervention.<sup>48</sup>

In 2012, as the ICISS and scholars feared, two of the Permanent Five members vetoed a resolution invoking the Responsibility to Protect in Syria,<sup>49</sup> effectively denying the international community the primary means by which it could authorize military action to halt additional atrocities within Syria.<sup>50</sup> While the United Nations General Assembly subsequently voted overwhelmingly to condemn the actions of the Syrian government against its own people and to support action aligned with the Arab League's recommendations for observers, the formal vetoes of Russia and China on the initial United Nations Security Council Resolution (UNSCR) cast a chilling pall upon the legitimacy of any potential military intervention. Indeed, UNSCR 1973 authorizing military action against Libya on behalf of the Libyan people may be relegated to historical anomaly.

In an article for the Yale Law Journal in 2006, the author noted, “[v]etoes by the permanent members of the Security Council – or even threats of vetoes – can undermine effective international action.”<sup>51</sup> Arguably, the recent vetoes cast by Russia and China emboldened the Assad regime to continue on its current course of conduct. The vetoes signaled to Assad that he need not fear the same fate of Qadaffi in Libya and could therefore continue with the military action against his own people without fear of imminent armed attack from outsiders. In light of these recent developments, the international community now faces the difficult task of identifying alternative means of legitimacy for coercive intervention. Because of its unique role as the remaining global

superpower, the United States may explore the development of and support for alternative means. The United States should seize the opportunity to shape doctrine rather than wait for other states to develop new criteria for legitimizing coercive intervention.

### Current United States Policy

The current National Security Strategy outlines the United States clear support for the principles contained within the Responsibility to Protect doctrine stating:

[t]he United States and all member states of the U.N. have endorsed the concept of the “Responsibility to Protect.” In so doing, we have recognized that the primary responsibility for preventing genocide and mass atrocity rests with sovereign governments, but that this responsibility passes to the broader international community when sovereign governments themselves commit genocide or mass atrocities, or when they prove unable or unwilling to take necessary action to prevent or respond to such crimes inside their borders. The United States is committed to working with our allies, and to strengthening our own internal capabilities, in order to ensure that the United States and the international community are proactively engaged in a strategic effort to prevent mass atrocities and genocide. In the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and – in certain instances – military means to prevent and respond to genocide and mass atrocities.<sup>52</sup>

Not surprisingly, the United States does not intend to cede its global leadership in this area to others. The NSS specifically notes that “American interests are enduring [and include] [a]n international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation to meet global challenges.”<sup>53</sup>

To that end, the United States may consider identifying policies to move beyond the United Nations Security Council when all other criteria for military intervention under the Responsibility to Protect have been met.

The 2011 UNSCR, invoking the obligations of the Responsibility to Protect in Libya,<sup>54</sup> produced a hopeful result. Unfortunately, the resolution regarding Libya

appears to have been a unique event rather than a precedent.<sup>55</sup> If Russian and Chinese vetoes on the recent Syrian resolution reflect the standard for future Responsibility to Protect authorizations, then the international community will have lost the existing, primary tool by which the world community can legitimately authorize coercive intervention to pierce the shield of sovereignty to protect those at risk. As a result, the United States should explore alternate means to legitimize coercive action under the Responsibility to Protect. To do otherwise would be the equivalent of allowing Russia or China to hold US policy and its role as international leader hostage to the self-interests of the other four members of the Permanent Five and to abdicate its responsibility for intervention to protect civilians facing mass killings, ethnic cleansing, or genocide. If a given situation meets the criteria for coercive intervention under the Responsibility to Protect, the United States will not stand idly by in another Rwanda-like situation simply because a member of the Permanent Five has exercised its veto and chosen not to act.

The moral imperative to take action under the Responsibility to Protect when a population faces mass killing, ethnic cleansing or genocide provides a powerful motivator for the United States to explore other means of legitimacy. As noted earlier, the ICISS deemed the Security Council as the only legitimate authority to approve coercive intervention under the doctrine. The ICISS recognized the potential leverage a member of the Permanent Five could have by threatening or actually using its veto in a Responsibility to Protect situation. Powerless to enforce any other standard, the ICISS strongly encouraged the Permanent Five to pledge to withhold a veto. Because the Permanent Five did not affirmatively support the pledge, the moment for doing so has

now effectively passed given Russia and China's recent veto vis-à-vis Syria.<sup>56</sup> A pledge from the Permanent Five now would require Russia and China to admit an error in judgment, and it is highly unlikely that either country will risk concessions which others might perceive as weakness.

#### Alternate Means to Obtain Legitimacy for Intervention

In light of the current situation, the United States may cease, temporarily at least, presenting Responsibility to Protect resolutions to the United Nations Security Council in the future and assess other mechanisms to obtain international legitimacy for intervention. To that end, the United States, in its role as a global leader, has a number of options to evaluate, some of which include those outlined by Richard Falk in his article "Legality and Legitimacy,"

[t]he Security Council is encouraged strongly to discharge its responsibilities, but if it fails to do so, then action may be taken by a descending hierarchy of empowered actors: the General Assembly, regional and sub-regional actors, and finally, 'concerned states'. ...the main point is that external actors have an obligation to act in a timely and effective fashion.<sup>57</sup>

United States policymakers may opt to explore options and assess the validity for implementation as well as the likelihood and breadth of acceptance in the international community for such alternate sources of authority.

*Option On. UN General Assembly.* Instead of presenting Responsibility to Protect issues to the Security Council for action, the United States could petition the General Assembly to take action. However, under both legal and practical analyses, such a petition would not produce the coveted legitimacy for military action, although it could be a preliminary tool for other means to legitimize force. Following the aforementioned February 4, 2012, Russian and Chinese vetoes of the recent UNSCR

on the deteriorating situation in Syria,<sup>58</sup> the General Assembly chose to demonstrate its concern for the targeted civilians in Syria. With an overwhelming majority<sup>59</sup> of support, the General Assembly voiced its distress about the impact of the Syrian government's action on those residing in Syria, particularly the city of Homs.<sup>60</sup> While the General Assembly demonstrated the concern of the international community for the people in Syria, the resolution stopped short of calling for any type of coercive action to intervene on behalf of those under attack by the Syrian government. In essence, the General Assembly's resolution informed the Syrian regime that the global community did not approve of the regime's action but did not have the collective means to do more than assert disapproval.

As noted earlier, under current interpretation of the UN Charter, the General Assembly lacks the legal authority to authorize the use of military force. Therefore, in the absence of an amendment to the UN Charter, General Assembly resolutions lack the coercive means to force any type of compliance. In this particular instance, the Syrian government did not heed the concerns of the General Assembly and has continued with its apparently indiscriminate shelling against geographic pockets of the population within Syria.<sup>61</sup> Presuming that the United Nations will not amend its Charter and that the legal interpretations that the General Assembly lacks the ability to authorize military action, the United States should not expect a General Assembly resolution alone to serve as an independent means of the "right authority" for military intervention under the Responsibility to Protect. At most, the United States might consider a General Assembly resolution as an "amber light" to proceed with forming a coalition outside of the United Nations itself.<sup>62</sup>



*Option Two. Regional Organizations with Geographic Stakes.* Under this second option, the United States may contemplate a two-prong approach to obtain the “right authority.” Under the first prong, the United States could turn to a UN recognized regional organization for support.<sup>63</sup> The regional organization would be in the geographic location of the state in which the civilian population faces mass killing or ethnic cleansing. In a Philippines based scenario, the United States would turn to the Association of Southeast Asian Nations<sup>64</sup> for the “right authority.” Tellingly, the UN Secretary-General envisions a greater role for regional and sub-regional organizations across the Responsibility to Protect continuum, noting that

[s]tates and civil society groups that are closer to the events on the ground may have access to more detailed information, may have a more nuanced understanding of the history and culture, may be more directly affected by the consequences of action taken or not taken, and may be critical to the implementation of decisions taken in New York.<sup>65</sup>

The report does not detail specified means of determining the “right authority” within regional organizations, recognizing that “one size” will not fit all situations.<sup>66</sup>

Nevertheless, the Secretary-General reminded the Member states and the regional organizations of the moral imperative to intervene on behalf of those faced with mass killings or ethnic cleansing. Specifically, the report states,

Context matters. The responsibility to protect is a universal principle. Its implementation, however, should respect institutional and cultural differences from region to region. Each region will operationalize this principles at its own pace and in its own way. I would encourage intra-regional dialogue among government officials, civil society representatives, and independent experts on how to proceed, such as the Study Group on the Responsibility to Protect of the Council for Security Cooperation in the Asia Pacific (CSCAP) of the ASEAN Regional Forum (ARF). Regional, as well as global, ownership is needed. But make no mistake: *each region must move forward, step by step, to ensure that populations are more protected and that the risk of mass atrocity crimes recedes with each passing year* (emphasis added).<sup>67</sup>

Under a regional organizational approach focused on the people of a sovereign state located within that geographic region, a super-majority vote by members to authorize military intervention would be required. When the country of interest falls within the geographic location of the regional organization, then the concerned nations might consider requiring a two-thirds majority vote from the members of the regional organization.<sup>68</sup> Next, those regional organization members voting for military intervention should specify their troop and financial contributions to the proposed intervention, identify exit criteria, and pledges of financial support to the affected sovereign state following resolution of the hostilities. The pledges of troop and financial contributions will demonstrate to the international community the political will of the regional organization to halt the atrocities, thus helping to identify the ways and means for accomplishing the ends. Furthermore, the requirement to identify exit criteria and pledges of support after the cessation of the atrocities will instill a more disciplined and reasoned approach to the feasibility of intervention and likelihood of success.<sup>69</sup> This level of commitment from a recognized regional organization paired with a written petition from the United Nations Special Advisor on the Responsibility to Protect culminating in an endorsement by the United Nations Secretary General could confer the sought after legitimacy for military intervention.

*Option Three. Regional Organizations Outside the Geographic Area of the Concerned State.* The third option involves a slightly different geo-political context which would require a broader demonstration of support from the members of UN recognized regional organizations. The third option might arise when a state targets its own population but the nearby regional organization does not vote to authorize coercive

intervention as outlined in Option two above. The nearby regional organization may be complacent, impotent, or too fractured to address the matter in the neighboring state. In that instance, the international community should have an alternate means to legitimize military intervention. Under this type of scenario, two or more recognized regional organizations from outside the concerned geographic area could legitimize military intervention with a vote of three-fourths of each organization's members.<sup>70</sup> Akin to the contributions of member states in Option Two above, the states voting in favor of coercive intervention should articulate the military and financial means by which they will support the military intervention. Finally, those casting affirmative votes for intervention should, at that time, also provide specific pledges of economic support for rebuilding from the individual states and the collective coffer of the regional organizations themselves.

Consider a Nigerian based scenario in which the government begins to target a specific religious minority and it soon becomes clear that the government is engaging in ethnic cleansing. In this scenario, if a resolution were presented to the Security Council, China might exercise its veto based on concerns about its economic investments in Nigeria. Next, with Nigeria's relative economic and military regional dominance, the African Union (AU) might be unable to reach a two-thirds supermajority to authorize coercive intervention to halt the ethnic cleansing despite that the AU's Constitutive Act expressly authorizes the right to intervene in another sovereign territory when crimes against humanity occur.<sup>71</sup> However in this scenario, the European Union (EU) and the Organization of American States (OAS) remain convinced that all other criteria for coercive intervention have been met. If three-fourths of the members of the EU and the

OAS voted in favor of intervention and specified contributions to the intervention and rebuilding as well as exit criteria, then the international community could credibly argue that it had obtained the “right authority” for intervention on behalf of the targeted people in Nigeria to prevent their continued slaughter. The burden in the third option is more onerous because the legitimizing action is more tenuous given concerns about a lack of accountability for intervention in a geographic area beyond one’s previously identified regional interests.

### Conclusion

The 1994 genocide in Rwanda served as a clarion call to develop a framework to prevent mass killings and ethnic cleansing, to intervene expediently when prevention fails, and to rebuild infrastructure once the atrocities cease. In 1999, Kofi Annan created controversy when he stated, “[n]o government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples.”<sup>72</sup> Remarkably, within two years, the ICISS fused international support to define the fundamental principle of sovereignty as a state’s responsibility to protect the people within its borders. From that core principle, the ICISS developed a remarkable framework to identify those actions which merited intervention on behalf of targeted people. Through its conferences held across the globe, the ICISS laid a solid foundation of support leading four years later to unanimous acceptance for the principles of the Responsibility to Protect at the 2005 United Nations World Summit. The ICISS correctly identified the Achilles’ heel in the process when it urged the Permanent Five Members of the Security Council to pledge to abstain rather than veto a resolution based on the Responsibility to Protect. In 2011, the vote in support of the Responsibility to Protect in Libya held promise that the Permanent Five members might

act in accordance with the recommendations of the ICISS. However, the Russian and Chinese vetoes on a Responsibility to Protect measure in Syria demonstrated that the Security Council's ability to serve as the sole means to legitimize coercive intervention likely suffered a fatal blow. In light of those vetoes, the international community should identify alternate means to legitimize coercive intervention when a government targets its own people through commission or omission.

The United States as the dominant military and economic global power has the influence to lead discussions to develop these alternate means. Because of its logistical capabilities, the United States will frequently be called upon to assist with these types of conflicts in the future. As a practical matter, the United States may seek to shape the context of these types of interventions to more closely align them with its national interests. The most prudent and acceptable means to legitimize coercive intervention focus on already existing regional organizations and votes by a super-majority of their members. The United States may consider shaping the dialogue to match words with deeds by requiring that those nations voting in favor of intervention also identify the ways and means by which they will support intervention. While it may be impossible to ensure the prevention of future genocide like that which occurred in Rwanda, the moral cost of failing to try is untenable and inconsistent with the United States' national values. As Kofi Annan stated in his remarks to the Rwandan Parliament five years after the genocide, "We must and do acknowledge that the world failed Rwanda at that time of evil. The international community and the United Nations could not muster the political will to confront it."<sup>73</sup> If the United States confronted a similar situation which met all of the criteria of the Responsibility to Protect save for the

approval of the Security Council, then the United States should have readily available means by which to seek alternate legitimization for intervention in order to act quickly and decisively to save those targeted civilians at the mercy of the state in which they reside. To do less is to ignore the shameful lessons of the past.

## Endnotes

<sup>1</sup> Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," Report of the International Commission on Intervention and State Sovereignty, (Ottawa, Ontario, International Development Research Centre, 2001), 1.

<sup>2</sup> UN General Assembly, Resolution 60/1, "2005 World Summit Outcome," A/RES/60/1, October 24, 2005, paragraphs 138-139, 30, <http://www.un.org/Depts/dhl/resguide/r60.htm> (accessed March 19, 2012).

<sup>3</sup> Barack H. Obama, *National Security Strategy*, (Washington, DC: The White House, May 2010), 47.

<sup>4</sup> Ibid., 7. Indeed, the NSS states that "[i]n the past, the United States has thrived when both our nation and our national security policy have adapted to shape change instead of being shaped by it."

<sup>5</sup> Maher Chmaytelli, "Rebels Appeal for NATO to Break Qaddafi's Misrata Siege," *Bloomberg Businessweek*, April 12, 2011, <http://www.businessweek.com/news/2011-04-12/rebels-appeal-for-nato-to-break-qaddafi-s-misrata-siege.html> (accessed March 18, 2012).

<sup>6</sup> UN Security Council Resolution 1973, "The Situation in Libya," March 17, 2011, 1, [http://www.un.org/Docs/sc/unsc\\_resolutions11.htm](http://www.un.org/Docs/sc/unsc_resolutions11.htm) (accessed March 19, 2012).

<sup>7</sup> UN News Centre, "Syria: Ban Voices Deep Regret after Security Council Fails to Agree on Resolution," February 4, 2012, <http://www.un.org/apps/news/story.asp?NewsID=41144&Cr=Syria&Cr1=,> (accessed March 19, 2012).

<sup>8</sup> UN General Assembly, Resolution 66/253, February 16, 2012, A/RES/66/253, February 16, 2012, <http://www.un.org/depts/dhl/resguide/r66.shtml>, (accessed March 19, 2012).

<sup>9</sup> Elizabeth G. Ferris, *The Politics of Protection*, (Washington, DC: Brookings Institution Press, 2011), 164.

<sup>10</sup> UNSCR, 1973.

<sup>11</sup> UN General Assembly, A/RES/60/1, 30.

<sup>12</sup> Dennis C. Blair, *Annual Threat Assessment of the US Intelligence Community for the Senate Select Committee on Intelligence*, (Washington, DC: Office of the Director of National Intelligence, February 2, 2010), 37.

<sup>13</sup> While some might argue for a fourth option focusing on ad hoc partnerships or unilateral United States' action, such options significantly devalue the credibility of intervening under "right authority" and may well erode international support for the Responsibility to Protect doctrine in whole. As such, while the United States always reserves the right to act unilaterally or with partners to advance national interests, the lack of coherent, logical arguments about obtaining "right authority" before intervention will shift any intervention out of the realm of the Responsibility to Protect and into some other justification. Accordingly, this paper will not attempt to articulate a method to legitimize coercive intervention by a unilateral actor or ad hoc coalition.

<sup>14</sup> Ibid.

<sup>15</sup> Evans and Sahnoun, "The Responsibility to Protect," vii.

<sup>16</sup> Ibid., xi.

<sup>17</sup> Elizabeth G. Ferris, *The Politics of Protection*, 164.

<sup>18</sup> Evans and Sahnoun, "The Responsibility to Protect," 83.

<sup>19</sup> Ibid., 81-83.

<sup>20</sup> Ibid., xi-xii.

<sup>21</sup> Ibid., 11.

<sup>22</sup> Ibid., 32.

<sup>23</sup> Ibid., xii.

<sup>24</sup> Ibid., xii.

<sup>25</sup> Ibid., 11.

<sup>26</sup> Ibid., 34.

<sup>27</sup> Report of the Secretary-General, "Implementing the Responsibility to Protect," January 12, 2009, 8, <http://www.unrol.org/doc.aspx?d=2982>, (accessed March 19, 2012).

<sup>28</sup> UN General Assembly, A/RES/60/1, 30.

<sup>29</sup> Ibid., (emphasis added).

<sup>30</sup> Evans and Sahnoun, "The Responsibility to Protect," 8.

<sup>31</sup> Charter of the United Nations, Article 2.1, October 24, 1945, <http://www.un.org/en/documents/charter/index.shtml>, (accessed March 19, 2012).

<sup>32</sup> Evans and Sahnoun, "The Responsibility to Protect," xii.

<sup>33</sup> Ibid., 36.

<sup>34</sup> Ibid., 11.

<sup>35</sup> The ICISS purposefully did not define the term, "large scale loss of life" presumably to avoid a situation in which a ruler could effectively argue that the threshold had not been met because less than 10,000 people had been killed in the action. By avoiding a precise number or percentage, the ICISS maximized the flexibility of responding to different situations.

<sup>36</sup> Evans and Sahnoun, "The Responsibility to Protect," 34.

<sup>37</sup> Ibid., 35.

<sup>38</sup> Ibid., 36.

<sup>39</sup> Report of the Secretary-General, "Implementing the Responsibility to Protect," January 12, 2009, 22.

<sup>40</sup> Eric A. Heinze, *Waging Humanitarian War*, (Albany, NY: State University of New York Press, 2009), 4.

<sup>41</sup> Evans and Sahnoun, "The Responsibility to Protect," 47.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., 47-55.

<sup>45</sup> In its 2001 report, the ICISS analyzed the UN Charter to identify means by which the international community could legitimately authorize military intervention on behalf of citizens threatened by genocide, ethnic cleansing, or mass killing. Through its analysis, the ICISS determined that the UN Charter, specifically, Article 42, vested only the UN Security Council with the authority to legitimize the application of force within the sovereign territory of a state. See generally Evans and Sahnoun, "The Responsibility to Protect" for additional detail, 47-55.

<sup>46</sup> Evans and Sahnoun, "The Responsibility to Protect," 75.

<sup>47</sup> UNSCR, 1973.

<sup>48</sup> Scholar Elizabeth Ferris highlighted this concern writing in 2011, "[t]he increasing politicization of Security Council engagement with protection of civilians is evident, paralleling discussions of the responsibility to protect concept. Governments that are involved in a conflict and their allies "have been increasingly resistant to Council involvement in protection activities, perhaps feeling that this will limit their options." The Security Council's report on engagement of the council with protection of civilians suggests that a major problem for council engagement lies in council dynamics: the council has demonstrated a persistent inability to act effectively in some of the worst situations for civilians because of the tension between the political interests of



its members and their protection commitments.” See Elizabeth Farris, *The Politics of Protection*, 151.

<sup>49</sup> UN News Centre, “Syria” February 4, 2012.

<sup>50</sup> While the ICISS offered some alternate means to legitimize coercive intervention, each alternate relied upon ratification by the UN Security Council. Thus, in an instance where a member of the Permanent Five exercised a veto, the ICISS report stopped well short of stating that the UN General Assembly or regional organizations within the UN could act independently of the UN Security Council or in opposition to a veto from one of the Permanent Five. Perhaps the ICISS did so in order to gain enough support to obtain unanimous support for the most critical portion of the Responsibility to Protect, to wit: the dual nature of sovereignty and a state’s obligation to protect its people. It may be that the ICISS forsook the perfect for the good enough if the ICISS realized that prominent members of the international community might reject the doctrine in its entirety unless significant constraints were placed upon the ability to legitimize military intervention. See generally Evans and Sahnoun, “The Responsibility to Protect,” 47-55.

<sup>51</sup> Alicia L. Bannon, “The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism,” *The Yale Law Journal*, 2006, 1157.

<sup>52</sup> Obama, *National Security Strategy*, 2010, 48.

<sup>53</sup> *Ibid.*, 7.

<sup>54</sup> UNSCR, 1973.

<sup>55</sup> Report of the Secretary-General, “The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect” A/65/877-S/2011/393, paragraph 30, June 27, 2011, <http://www.un.org/en/ga/president/65/initiatives/Report%20of%20the%20SG%20to%20MS.pdf> (accessed March, 19, 2012).

<sup>56</sup> In his report, “Implementing the Responsibility to Protect” A/63/677, January 12, 2009, the United Nations Secretary-General seemed to infer a realization that the 2005 World Summit agreement arose from a unique sets of circumstances in a particular historical context that may not recur in the foreseeable future. In Section V, paragraph 67 of the report, the Secretary-General specifically stated, “Indeed, it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraph 138 and 139 of the Summit Outcome. Those provisions represent a remarkably good outcome, which will well serve the ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights, while reinforcing the letter and spirit of the Charter and the abiding principles of responsible sovereignty.”

<sup>57</sup> Richard Falk, “Legality and legitimacy,” in *Force and Legitimacy in World Politics*, ed. David Armstrong, Theo Farrell, and Bice Maiguascha, (Cambridge, UK: Cambridge University Press, 2011), 40.

<sup>58</sup> UNSCR, 1973.

<sup>59</sup> Rick Gladstone, *The New York Times*, “General Assembly Votes to Condemn Syrian Leader” February 17, 2012, A12. 137 votes in favor, 12 votes against, and 17 abstentions.

<sup>60</sup> UN General Assembly, A/RES/66/253.

<sup>61</sup> Rick Gladstone, The New York Times, "Syria Permits U.N. Visits, but Escalates Its Attacks," March 6, 2012, A9.

<sup>62</sup> Evans and Sahnoun, "The Responsibility to Protect," 170.

<sup>63</sup> UN Security Council, SC/9840, "Security Council to Promote Closer, More Operational Cooperation between United Nations, Regional Organizations in Early Warning, Peacekeeping, Peacebuilding," January 13, 2010, <http://www.un.org/News/Press/docs/2010/sc9840.doc.htm>, (accessed March 19, 2012).

<sup>64</sup> Barry Desker and Joel Ng, "Responsibility to Protect Tensions Between Sovereignty and Security – Analysis," Rajaratnam School of International Studies, October 10, 2011, <http://www.eurasiareview.com/10102011-responsibility-to-protect-tensions-between-sovereignty-and-security-analysis/>, (accessed March 19, 2012).

<sup>65</sup> Report of the Secretary-General, "The role of regional and sub-regional arrangements in implementing the responsibility to protect" A/65/877-S/2011/393, paragraph 6.

<sup>66</sup> Ibid., paragraph 7.

<sup>67</sup> Ibid., paragraph 8.

<sup>68</sup> A super-majority vote of 2/3 or 8/12 is the same margin by which the Congress may override a Presidential veto. U.S. Constitution, art. I, sec. 7.

<sup>69</sup> Alexander L. George, "The Concept of National Interests: Uses and Limitations," in *Presidential Decisionmaking in Foreign Policy: The Effective Use of Information and Advice.*, p. 235, Copyright 1980 by Perseus Books Group. In his assessment of what often drives US foreign policy decision-making, George points to the desirability to take action in a crisis overriding the feasibility of taking action, which then leads to "open-ended commitment of incremental actions."

<sup>70</sup> A super-majority vote of 3/4 or 9/12 is the same margin by which the Congress may amend the Constitution. US Constitution, Art V.

<sup>71</sup> Ferris, *The Politics of Protection*, 165.

<sup>72</sup> Kofi Annan, "Two Concepts of Sovereignty", The Guardian, September 18, 1999, <http://www.un.org/News/press/docs/1999/19990506.SGSM6552.html>, (accessed March 19, 2012).

<sup>73</sup> Kofi Annan, "Mission of Healing", Speech to Rwandan Parliament, May 6, 1998, <http://www.un.org/News/Press/docs/1998/19980506.SGSM6552.html>, (accessed March 19, 2012).